

TEMPORARY ADMINISTRATIVE RULES

THESE ADMINISTRATIVE RULES ARE TEMPORARY RULES ISSUED
PURSUANT TO SECTION 231-10.7, HAWAII REVISED STATUTES.

AS TEMPORARY RULES, THESE ADMINISTRATIVE RULES BECOME
EFFECTIVE SEVEN DAYS AFTER PUBLIC NOTICE IS ISSUED. THESE
TEMPORARY ADMINISTRATIVE RULES TAKE EFFECT ON

DEC 16 2009

TEMPORARY ADMINISTRATIVE RULES ARE EFFECTIVE FOR EIGHTEEN
MONTHS. THESE TEMPORARY ADMINISTRATIVE RULES WILL EXPIRE
ON JUN 16 2011.

PERMANENT ADMINISTRATIVE RULES, SUBJECT TO THE PROCEDURAL
REQUIREMENTS OF CHAPTER 91, HAWAII REVISED STATUTES (THE
HAWAII ADMINISTRATIVE PROCEDURES ACT), ARE SIMULTANEOUSLY
BEING PROPOSED FOR FORMAL ADOPTION.

DEPARTMENT OF TAXATION

Adoption of Chapter 18-231
Hawaii Administrative Rules

October 26, 2009

SUMMARY

1. A new §18-231-91-01T is added.
2. A new §18-231-91-02T is added.
3. A new §18-231-91-03T is added.
4. A new §18-231-91-04T is added.
5. A new §18-231-91-05T is added.
6. A new §18-231-91-06T is added.
7. A new §18-231-91-07T is added.
8. A new §18-231-91-08T is added.

9. A new §18-231-91-09T is added.
10. A new §18-231-91-10T is added.
11. A new §18-231-91-11T is added.
12. A new §18-231-91-12T is added.
13. A new §18-231-91-13T is added.

HAWAII ADMINISTRATIVE RULES

TITLE 18

DEPARTMENT OF TAXATION

CHAPTER 231

ADMINISTRATION OF TAXES

§18-231-91-01T	Tax citations; procedures; scope and purpose.
§18-231-91-02T	Commencement of a cease and desist citation action.
§18-231-91-03T	Filing the cease and desist citation
§18-231-91-04T	The cease and desist citation; requirements
§18-231-91-05T	Venue
§18-231-91-06T	Answer and appearance
§18-231-91-07T	Docketing of hearing; scheduling
§18-231-91-08T	Presiding officer for contested case hearings
§18-231-91-09T	Contested case hearing proceedings
§18-231-91-10T	Special proceedings; jeopardy
§18-231-91-11T	Judgment
§18-231-91-12T	Post-judgment relief
§18-231-91-13T	Computation of time

1. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-01T to read as follows:

"TAX CITATIONS; CONTESTED CASE HEARING PROCEDURES

§18-231-91-01T Tax citations; procedures; scope and purpose. (a) Pursuant to section 231-91, HRS, the Special Enforcement Section may issue cease and desist citations to any person if the Special Enforcement Section has cause to believe the person has violated, is violating, or is about to violate any provision of title 14, HRS, or administrative rule adopted thereunder. Such citations may include a monetary fine. The following are infractions of title 14, HRS, enforceable by the Special Enforcement

Section, which also include the possibility of a monetary fine:

- (1) Failure to produce license upon demand, HRS § 231-94;
- (2) Failure to keep adequate books and records, HRS § 231-95;
- (3) Failure to record transaction by receipt, HRS § 231-96;
- (4) Failure to record transaction by register, HRS § 231-97;
- (5) Tax avoidance price fixing, HRS § 231-98;
- (6) Possession of currency for tax avoidance purposes, HRS § 231-99;
- (7) Interference with a tax official, HRS § 231-100; and
- (8) Failure to obtain a general excise tax license, HRS 237-8.

(b) Contested case hearings. Section 231-91(e) provides persons cited with a cease and desist citation the opportunity to appeal the citation before the director of taxation or the director's designee. Disputes regarding cease and desist citation shall be resolved by a contested case hearing.

(c) Scope. The administrative rules contained in sections 18-231-91-01 through 18-231-91-13 shall govern the practice and procedure before the director of taxation for all contested case hearings, including those involving cease and desist citations issued by the Special Enforcement Section and special investigative proceedings.

(d) Tax related citation; character. A cease and desist citation is a civil matter. A monetary fine accompanying a citation is not a tax.

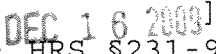
(e) Purpose. The administrative rules contained in sections 18-231-91-01 through 18-231-91-13 shall be construed to secure the just, speedy, and inexpensive determination of every cease and desist citation issued."

[Eff **DEC 16 2009**] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

2. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-02T to read as follows:

"§18-231-91-02T Commencement of a cease and desist citation action. A cease and desist citation action, upon which an appeal may be had to the director under these

rules, is commenced by serving the citation on the person named in the citation. Acceptable service may be made as follows:

- (1) Personal service. Personal service constitutes the actual physical handing of the citation to the person named in the citation.
 - (2) Certified mail. Service is also proper by placing a copy of the citation in the United States mails, certified and postage prepaid.
 - (3) Other. Service may also be acceptable through other means, including:
 - (i) Actual knowledge of a citation made through means other than in paragraphs (1) or (2);
 - (ii) Leaving a copy of the citation conspicuously at the person's last known residential or business address, such as posted to the front door of the establishment;
 - (iii) Service upon the person's attorney or other representative if known to the government;
 - (iv) By facsimile or electronic mail to a known business transmission number or electronic mail address; and
 - (v) The department may also specify other means of service through Tax Information Release; provided that service of a cease and desist citation under this paragraph shall accompanied by a certificate of service which declares that service was accomplished as allowed above and where by facsimile or electronic means, to a specific phone number or electronic mail address, on a specific date, at a specific time."
- [Eff  (Auth: HRS §§231-3, 231-91)
(Imp: HRS §231-91)

3. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-03T to read as follows:

"§18-231-91-03T Filing the cease and desist citation. The special agent of the Special Enforcement Section or some other person authorized to issue cease and desist citations shall file the government's copy of the original citation in the office of the director of taxation not later than three (3) days after the date the citation is issued. In the absence of good cause shown, a citation not filed within the time requirements of this section shall,

upon motion, be dismissed with prejudice." [Eff DEC 16 2009
] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

4. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-04T to read as follows:

"§18-231-91-04T The cease and desist citation; requirements. (a) Generally. A cease and desist citation must be issued on the forms prescribed by the department. There may be field citations, as well as office citations that may differ in form and size; however either must include the content required by this section.

(b) Authority to issue citations. Special agents of the Special Enforcement Section and auditors with the approval of a special agent of the Special Enforcement Section are authorized to issue cease and desist citations.

(c) Contents. A cease and desist citation shall include the following in its contents:

- (1) The name and address of the person to whom the cease and desist citation is being served;
- (2) The location of where the offense is about to occur, is occurring, or has occurred. If the location is a vehicle, this must be identified. If the location is at one or more branch locations or satellite locations of a particular person, this must also be identified;
- (3) The specific allegation or multiple allegations of tax law violations must be identified. The person issuing the citation must certify the alleged violations;
- (4) If the person who is the subject of the citation is alleged to be a cash-based business as defined in section 231-93, HRS, this allegation must be certified. A cease and desist citation without a certification that the person is a cash-based business cannot issue heightened fines for cash-based businesses and the person will be conclusively considered not a cash-based business for purposes of that one citation;
- (5) The amount of the civil fine imposed against the person;
- (6) A space for the person to acknowledge receipt of the citation. If the citation is served by means other than personal service, return of the citation to the department accepting or

contesting the allegations will be considered acknowledgment of receipt. If the person refuses to sign, the citation may indicate "refused to sign," "unavailable," or "no signature for safety reasons."

- (7) Information regarding appeal rights, including that the citation must be returned to the Special Enforcement Section within 30 days from the date of the citation; a right to a hearing before the director of taxation or the director's designee; and contact information for where the person may obtain further information.

(d) Section 18-231-91-04(c)(2) is illustrated by the following example:

EXAMPLE: Shorty's Drug Store is a chain of drug and sundry stores throughout Hawaii. There are over 50 locations. During an investigation of one of Shorty's locations located in Kona Town on the Big Island, it was observed by the Special Enforcement Section that this one location was failing to record sales transactions by receipt. A cease and desist citation will be properly issued if the citation identifies Shorty's Drug Store's corporate office in Honolulu as the person fined, as well as an identification of the Kona Town location as where the offense occurred."

[Eff 1 6 2009] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

5. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-05T to read as follows:

"§18-231-91-05T Venue. A contested case hearing shall be before the director of taxation or the director's designee. A hearing in person may be held at the department's offices at the first taxation district on Oahu or at any other location designated by the director or the director's designee. A hearing may also be held telephonically at the request of either the person cited or the government, with the approval of the director or the director's designee." [Eff DEC 16 2009] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

6. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-06T to read as follows:

"§18-231-91-06T Answer and appearance. (a)

Generally. A person who has been served with a cease and desist citation must respond to the citation within thirty (30) days from the date of its issuance. A response as provided in this section shall be considered the person's answer to the allegations contained in the cease and desist citation.

(b) Alternatives. A person may respond to a cease and desist citation by:

- (1) Paying the amount of the monetary fine in accordance with applicable law, in which case the director shall enter a judgment that the person has committed the violations of title 14, HRS, alleged in the citation; or
- (2) Contesting the determination that a violation of title 14, HRS, has occurred by requesting a hearing in accordance with applicable law.

(c) No joinder. Any hearing on a contested cease and desist citation shall be limited to the allegations contained in the citation. No further proceedings, including the non-filing or nonpayment of any tax, may be heard before the director of taxation or the director's designee.

(d) Failure to answer. If the person cited in the cease and desist citation fails to answer within thirty (30) days from the date the citation is issued, the director shall thereafter enter a default finding that the violation alleged in the citation has been committed. If the person cited tenders payment by negotiable instrument, including a personal check, and the instrument is dishonored upon presentment for payment, the person cited will be deemed not to have answered and a default finding that the violation alleged in the citation has been committed will be entered. Where a person fails to answer, the director or the director's designee shall impose any monetary fine chargeable by law.

(e) Appearance. A person contesting a cease and desist citation shall appear at a hearing ordered by the director of taxation. A person may appear by attorney or other authorized representative. Any person appearing in a representative capacity, including an attorney or tax practitioner, shall submit a notice of appearance and a

power of attorney at least seven (7) days prior to the date of the hearing.

(f) Failure to appear. Where a person fails to appear, the director or the director's designee shall impose any monetary fine chargeable by law." [Eff DEC 16 2009]
] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

7. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-07T to read as follows:

"§18-231-91-07T Docketing of hearing; scheduling.

(a) Contested case hearings. Upon receipt by the Special Enforcement Section of a cease and desist citation wherein the person contests the allegations and requests a hearing, an agent of the Special Enforcement Section shall notify the director of the request and schedule a hearing on whether the violations alleged in the citation have been committed. Contested case hearings shall be set for not less than fourteen (14) days and not more than ninety (90) days from the date of receipt of the request for a hearing.

(b) Continuance. Upon motion, the director may continue a hearing to another time beyond the ninety days provided in this section for good cause.

(c) Docketing convenience. The director is authorized to docket hearings on a single day in each month; provided that the timing requirements of subsection (a) are satisfied. For example, the director is authorized to hold a hearing on all cease and desist citations and relevant motions on the last Friday of every month.

(d) Notice to Special Enforcement Section and cited person. After the director has scheduled a contested case for hearing, the director or the director's designee shall send written notice to the Special Enforcement Section and the person cited within three (3) days from the date of scheduling. The director or the director's designee shall also send the person cited information about the person's rights at the hearing and the requirement to appear."

[Eff DEC 16 2009] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

8. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-08T to read as follows:

"§18-231-91-08T Presiding officer for contested case hearings. (a) Presiding officer. The director of taxation shall be the presiding officer at the hearing. The director may also designate an agent who shall be the presiding officer. The presiding officer shall conduct the hearing, shall render a decision, and shall issue such orders and take such further action as may be required.

(b) Conflicts. The director or the director's designee shall be disqualified from deciding a contested matter if the director or the director's designee:

- (1) Has a substantial financial interest, as defined in section 84-3, HRS, in a business or other undertaking that will be directly affected by the decision of the contested case;
- (2) Is related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney;
- (3) Has materially participated in the investigation preceding the institution of the contested case proceedings or has participated in the development of the evidence to be introduced in the hearing; or
- (4) Has a personal bias or prejudice concerning a party that will prevent a fair and impartial decision involving that party.

Any alleged conflict may be raised and argued to the presiding officer upon motion by either party. Conflicts under this section may be waived if both parties approve.

(c) Substitutes. If a director's designee is absent or otherwise unable to proceed with the designee's duties associated with a contested case hearing, the director may designate another representative to serve as a substituting presiding officer without abatement of the proceedings.

(d) Powers. In all such proceedings, the presiding officer shall have the power to give notice of the hearing, arrange for the administration of oaths, examine witnesses, certify official acts, rule on offers of proof, receive relevant evidence, regulate the course and conduct of the hearing, including regulating the manner of any examination of a witness to prevent harassment or intimidation and ordering the removal of disruptive individuals, and perform such other duties necessary for the proper conduct of the hearing.

(e) Ex parte communications. No person shall communicate with the presiding officer regarding matters to be decided by the presiding officer with the intent, or the appearance of intent, to influence the decision of the

agent, unless all of the parties to the proceedings are given notice of the communication and an opportunity to also communicate. The presiding officer shall disclose any ex parte communications or attempts at ex parte communications on the record and allow all parties the opportunity to respond, refute, or comment on any such communication.

(f) Subpoena power. The presiding officer shall have the power to subpoena witnesses and books and records as authorized under section 231-7, HRS. Any person's disobedience relating to a subpoena issued by the presiding officer may be enforced upon application to the circuit court. [Eff **DEG 16 2009**] (Auth: HRS §§231-3, 231-91)
(Imp: HRS §231-91)

9. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-09T to read as follows:

"§18-231-91-09T Contested case hearing proceedings.

(a) Generally. The hearing shall be conducted pursuant to the requirements of chapters 91 and 231, HRS.

(b) Procedure. The procedure for all contested hearings shall be informal. Notwithstanding the informal nature of the hearing, both parties may be represented and motions may be filed.

(c) Standard of proof. The standard of proof applied shall be preponderance of the evidence.

(d) Burden of proof. The burden of proof as to whether or not a violation has occurred shall be on the government; provided that the burden of proof for establishing any defense or mitigating circumstances surrounding an alleged violation shall be on the person asserting the defense or mitigating circumstance.

(e) Evidence. Evidence shall consist of the cease and desist citation, any applicable reports, or other written statements submitted by either party. The presiding officer shall not be bound by rules of evidence; except provisions relating to privileged communications.

(f) Motions. Any party to a contested case hearing may make a motion requesting the presiding officer to make a determination on any matter relevant to the hearing. A motion made in writing shall be served upon the presiding officer and the opposing party not less than five (5) days prior to the scheduled hearing date. A motion may be made orally at the hearing without prior notice.

(g) Record. The presiding officer shall take a verbatim record of the evidence presented at any hearing by any reasonable means within the presiding officer's discretion, including an audio recording. At the request of a party, the presiding officer may engage the services of a stenographer, or someone similarly skilled, to take a verbatim record of evidence presented at any hearing. Any party may request a certified transcript of the proceedings. The party making the request for the services of a stenographer or certified copies of the hearing shall be responsible for the relevant costs.

(h) Mitigating circumstances. The presiding officer may consider evidence of whether there were mitigating circumstances surrounding the commission of an alleged violation. If the presiding officer accepts mitigating circumstances into evidence, there shall be a finding that a violation has occurred and the presiding officer may abate any amount of a monetary fine imposed within the presiding officer's discretion." [Eff **DEC 16 2009**] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

10. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-10T to read as follows:

"§18-231-91-10T Special proceedings; jeopardy. (a) Investigative hearings. Notwithstanding any other law or rule to the contrary, the director or the director's designee may conduct any inquiry, investigation, or hearing, relating to any assessment, or the amount of any tax, or the collection of any delinquent tax, including any inquiry or investigation into the financial resources of any delinquent taxpayer or the collectability of any tax, as provided in section 231-7, HRS.

A hearing under this section may be initiated by submitting a petition to the director or the director's designee requesting such an investigation by any authorized representative of the department. A petition requesting an investigation under section 231-7, HRS, including a hearing to determine good cause, shall be an ex parte proceeding. The director or the director's designee shall only order an investigation under this section upon a showing of good cause.

Upon a finding and an order by the director or the director's designee that such an investigation shall commence, the subject person of the investigation shall be

personally served with written notice of the hearing. The investigative hearing shall be set for not less than fourteen (14) days and not more than ninety (90) days from the date of service of the finding and order.

The investigative hearing conducted under this section and under section 231-7, HRS, shall be a fact-finding hearing conducted pursuant to the contested hearing procedures of section 18-231-91-08 through 18-231-91-09, HAR.

A person failing to appear or cooperate with the provisions of an investigative hearing under this section and under section 231-7, HRS, may result in imprisonment not to exceed sixty days.

(b) Jeopardy fine. Notwithstanding any other rule to the contrary, any cease and desist citation carrying a fine found to be in jeopardy, in which case such fine is immediately payable and collectible, shall be immediately appealable to the director or the director's designee pursuant to section 231-91(d), HRS. A jeopardy appeal shall be administered as provided for all other cease and desist citation hearings; provided that the director shall cause a hearing to be had not later than seven (7) days after the issuance of a cease and desist citation wherein jeopardy has been asserted. The hearing may be continued upon motion pursuant to section 18-231-91-07(b)." [Eff] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

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11. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-11T to read as follows:

"§18-231-91-11T Judgment. (a) In favor of the government. If the director or the director's designee determines that a violation alleged in a cease and desist citation has been committed, judgment shall be entered in favor of the State. The director or the director's designee may impose a monetary fine, if any. The monetary fine cannot exceed the maximum monetary fine allowed by law.

(b) For purposes of this rule, submission of payment and electing not to contest a cease and desist citation shall be deemed a confession of judgment and shall be entered in the director's records accordingly.

(c) In favor of the cited person. If the director or the director's designee determines that a violation alleged in a cease and desist citation has not been committed, the

citation shall be dismissed. The dismissal shall be entered in the records of the director.

(d) Judgments; collection. Each judgment in favor of the State shall be due and payable thirty (30) days after the director or the director's designee enters judgment in favor of the State. The judgment may be collected through the collection resources of the department of taxation. In the director's discretion, any uncollected judgment may be referred to third parties, including the department of the attorney general or a collection agency. Nothing in this section shall affect the department's ability to take such other action as necessary to enforce a judgment, including the issuance of a levy or other process.

(e) Dishonored instruments. The director shall assess and collect a service charge for any check, draft, or other negotiable instrument dishonored for any reason.

(f) Third party collection fees. The director shall assess and collect any third party service fees for the collection of any unpaid judgment, including collection agency fees." [Eff **DEC 16 2009**] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

12. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-12T to read as follows:

"§18-231-91-12T Post-judgment relief. There shall be no post judgment relief other than the appeal rights under section 231-91(e), HRS. The determination of the director or the director's designee may be appealed to the circuit court pursuant to chapter 91, HRS. Proceedings for review of the director's decision shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the director or the director's designee pursuant to rule of court." [Eff **DEC 16 2009**]
] (Auth: HRS §§231-3, 231-91) (Imp: HRS §231-91)

13. Chapter 18-231, Hawaii Administrative Rules, is amended by adding a new temporary section 18-231-91-13T to read as follows:

"§18-231-91-13T Computation of time. In computing any time period under these rules, the day of the act, event, or default from which the period of time begins to

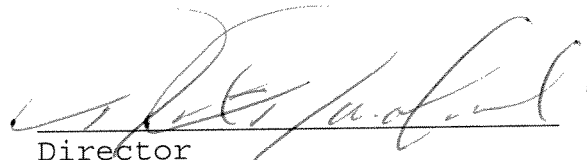
run shall not be included. The last day of the period so
computed shall be included, unless it is a Saturday,
Sunday, legal holiday, or government furlough day.
Intermediate Saturdays, Sundays, legal holidays, or
government furlough days shall be included. Whenever an
act required to be performed under these rules may be
accomplished by mail, the act shall be deemed to have been
performed on the date of the postmark on the mailed
article." [Eff DEC 16 2009] (Auth: HRS §§231-3, 231-91)
(Imp: HRS §231-91)

14. New material is underscored.

15. Additions to update source notes to reflect these amendments are not underscored.

16. These temporary amendments to chapter 18-231, Hawaii Administrative Rules, shall take effect seven days after public notice is issued.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format, pursuant to the requirements of section 231-10.7, HRS. These temporary amendments are effective on DEC 16 2009. These temporary amendments are effective for eighteen months from their effective date.


Director
Department of Taxation